No. 89-1858

In The Supreme Court Of The United States

OCTOBER TERM, 1989

EASTERN AUTO DISTRIBUTORS, INC.,

Defendant/Petitioner,

v.

PEUGEOT MOTORS OF AMERICA, INC.,

Plaintiff/Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where (1) the exclusive importer of Peugeot automobiles elects not to renew the franchise of its last remaining independent distributor, thereby terminating the franchise without cause in violation of New York General Business Law and the New York Franchised Motor Vehicle Dealer Act, and (2) the distributor's agreement expressly is "governed by the laws of the State of New York," should the distributor be denied the benefit of the New York statutes because it does not distribute vehicles in that state, and therefore does not fit within the literal statutory definitions which reflect the New York legislature's understanding of the territorial limitations of its police power.

PARTIES TO THE PROCEEDING

The only known parties to this proceeding are the petitioner, Eastern Auto Distributors, Inc., ("EAD") a corporation organized and existing pursuant to the laws of the Commonwealth of Virginia, and the respondent, Peugeot Motors of America, Inc., ("PMA") a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New Jersey. PMA is the successor by merger of Peugeot, Inc., a former New York corporation. EAD has no parent companies or subsidiaries required to be listed pursuant to Rule 29.1 of the Rules of the United States Supreme Court. PMA's parent company is Automobiles Peugeot,

S.A., a French corporation. EAD knows of no PMA subsidiaries required by the Rules to be listed.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

EASTERN AUTO DISTRIBUTORS, INC.,

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REFERENCE TO REPORTS OF OPINIONS

All opinions involved in this case are set forth, verbatim, in the Appendix filed herewith. These reports include a Judgment in Civil Case (with attached Opinion and Order dated July 20, 1988) entered by the United States District Court for the Eastern District of

Virginia (Norfolk Division) on July 25, 1988, by the Honorable Richard B. Kellam, Senior District Judge (Appendix, A1-A13); the published opinion of the United States Court of Appeals for the Fourth Circuit entered on December 19, 1989, reported at 892 F.2d 355 (A14-A53); and the Order denying EAD's Petition for Rehearing and Suggestion of Rehearing En Banc, entered February 27, 1990 (A54-A56).

STATEMENT OF JURISDICTION

The Fourth Circuit's decision was entered on December 19, 1989. EAD timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. EAD's Petition was denied by order filed February 27, 1990. Jurisdiction has been

conferred on this Court pursuant to 28 U.S.C. Section 1254(1). This Petition for Writ of Certiorari is timely pursuant to 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the United States Supreme Court.

STATUTES INVOLVED IN THE CASE

The only statutes involved in this petition are New York General Business Law §§ 195, 197 and 197a, New York Vehicle and Traffic Laws §§ 415 and 460-471, and New York General Obligations Law §§ 5-1401. Due to their length, and pursuant to Rule 14.1(f) of the Rules of the United States Supreme Court, EAD provides only the citations to the relevant statutory provisions at this point, and sets forth their pertinent text in the appendix. (A57-A69).

STATEMENT OF THE CASE

Since the 1950's, EAD has been the exclusive distributor of Peugeot automobiles in the Middle Atlantic and Southeastern United States. PMA imports, and outside EAD's exclusive territory also distributes, Peugeot cars, which are manufactured in France by PMA's corporate parent, Automobiles Peugeot. The relationship between EAD and PMA is governed by a Distributor Agreement dated the 1st day of January, 1971. Paragraph 39 of the Distributor Agreement states:

> It is the express intention of the parties hereto that this agreement shall be governed by the laws of the State of New York.

By letter of October 14, 1987, PMA notified EAD that it intended not to

renew the Distributor Agreement effective January 1, 1988. PMA subsequently filed a Complaint in diversity in the United States District Court for the Eastern District of Virginia seeking a declaratory judgment that its termination of EAD's franchise complied with the Distributor Agreement and applicable federal and state laws. EAD denied that PMA properly exercised any right of non-renewal and asserted, to the contrary, that PMA violated EAD's rights (a) under the federal Automobile Dealers Day in Court Act, 15 U.S.C., § 1221 et seq. ("DDICA"), (b) under certain New York automobile distributor and dealer protection statutes made applicable by the Distributor Agreement's choice of law provision, and (c) under

the Distributor Agreement itself. Essentially, EAD's counterclaims were defenses to the termination, except insofar as EAD sought damages under DDICA and for breach of contract in respect to one particular transaction referred to as the "Hertz Transaction" stemming from PMA's invasion of EAD's exclusive territory through fleet sales of automobiles and parts to Hertz. Only that portion of the Fourth Circuit's decision concerning the applicability of the New York statutes is the subject of this petition.

The New York statutes in question prohibit the termination, cancellation, or non-renewal of the Distributor Agreement without due cause. In discovery responses, PMA conceded that it

would not present evidence of any such cause in attempting to end EAD's franchise. Instead, PMA asserted that the New York statutes were inapplicable to the Distributor Agreement because EAD conducts no business in the State of New York and is not registered to do business there.

The district court granted EAD summary judgment on PMA's complaint for declaratory relief based upon the New York statutes. The Fourth Circuit panel, in a split decision, vacated this judgment, holding that the New York statutes were inapplicable due to the territorial limitations contained in the statutory definitions.

The district court also granted PMA summary judgment on EAD's counterclaims

alleging violation of DDICA and breach of contract (except for EAD's contract and DDICA claims related to the "Hertz Transaction," which were severed). The Fourth Circuit affirmed the district court on these judgments, holding that EAD's claims were barred by the doctrine of res judicata based upon earlier litigation between EAD and PMA. Although EAD disagrees with the Fourth Circuit's reasoning, it does not seek certiorari on this point.

Jurisdiction in the district court was based on diversity of citizenship, and was authorized by 28 U.S.C. § 1332(a). PMA, plaintiff below, is a Delaware corporation with its principal place of business in New Jersey. PMA's predecessor, Peugeot, Inc., was a New

York corporation. EAD is a Virginia corporation. EAD's principal place of business also is in Virginia.

ARGUMENT

The United States Court of Appeals for the Fourth Circuit improperly declined to apply New York statutes governing the termination of motor vehicle distributorships and dealerships to regulate the relationship between EAD and PMA. The Fourth Circuit based its decision on the provisions in these statutes which define a "distributor" as one who sells or distributes automobiles in New York (N.Y. Gen. Bus. Law § 195) and a "franchised motor vehicle dealer" as one required to be registered in New York pursuant to New York Vehicle & Traffic Law § 415. (N.Y. Veh. & Traf.

Law §462(7)). Although at the time of the Distributor Agreement PMA's predecessor was a New York corporation, EAD admittedly does no business in New York and is not required to be registered there.

The Fourth Circuit's opinion over-simplifies the question and ignores the express intention of the parties that New York law should govern their relationship. This decision also creates a split among the circuits. Compare C. A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1162 (5th Cir. 1977); Boatland, Inc. v. Brunswick Corp., 558 F.2d 818 (6th Cir. 1977); and Bimel-Walroth Co. v. Raytheon Co., 796 F.2d 840 (6th Cir. 1986). See also Gilchrist Machinery Co. v. Komatsu America Corp.,

601 F. Supp. 1192 (S.D. Miss. 1984); Swan Sales Corp. v. Jos. Schlitz Brewing Co., 126 Wis. 2d 16, 374 N.W.2d 640 (Wis. App. 1985). Most importantly, the Fourth Circuit's reversal of summary judgment in favor of EAD throws a cloud of uncertainty over choice of law provisions which have become a stabilizing factor in interstate and international commerce.

This case presents fundamental questions of commercial law for the Court's consideration. These questions are of utmost importance not only to the litigants, but also to contracting parties in every field who routinely agree upon operative state law.

PMA AND EAD INTENDED FOR THE NEW YORK STATUTES TO APPLY.

While PMA now denies any intention or expectation that the New York statutes would govern its relationship with EAD, its admissions and arguments in previous litigation with EAD and other independent distributors belie this denial. In its brief on appeal to the Fourth Circuit in a previous action by EAD, PMA relied upon the New York General Business Law:

> EAD's three-year failure to appoint a Peugeot dealer in the Wilmington market constituted good cause as a matter of law under New York General Business Law § 197 for PMA to terminate EAD's primary responsibility over the Delaware area. (JA324)

PMA's predecessor, Peugeot, Inc., made a similar admission in litigation with another distributor, Autowest, Inc., which sold vehicles in California, but

not in New York. Peugeot's contract with Autowest contained a governing law provision identical to the choice of law clause in the present case. The Joint Appendix on appeal in that case, Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556 (2d Cir. 1970), reveals that Peugeot's counsel stated "New York [law] applies; if the contract is in existence, then the [New York] statute obviously applies."

The Fourth Circuit focused on these admissions in determining the issue of judicial estoppel, but ignored them when facing the more crucial issue of the parties' intention to apply the New York statutes as expressed in the Distributor Agreement. Instead, the Court of Appeals looked at the obvious, but irrelevant,

intention of the New York legislature to govern only resident manufacturers, franchisors, dealers, and distributors by enacting the statutes in question.

The Fourth Circuit failed to consider the expressed intention of the parties, the traditional guiding light to contractual interpretation and analysis, and refused to apply the New York statutes. Indeed, it is difficult to imagine that sophisticated automobile manufacturers, importers, distributors, and dealers expressly would agree to apply New York law, while silently intending to withhold the protection of the New York statutes which dealt specifically with the relationships among such entities. The Fourth Circuit's

decision, however, reaches such a conclusion.

In this case, Peugeot, Inc., a New York corporation, drafted a form Distributor Agreement which might be used anywhere in the United States. For obvious reasons of certainty, predictability, and convenience, PMA's predecessor selected the laws of its own state, New York, to control the rights and duties of the parties to these agreements, few, if any, of whom would reside or operate in New York. The Fourth Circuit's decision undermines that element of predictability which choice of law provisions are designed to provide. In so doing, it violated the clear intention and understanding of the

contracting parties, and, in effect, drew a new contract for them.

NEW YORK LAW SHOULD GOVERN PMA'S ATTEMPT TO TERMINATE EAD'S FRANCHISE.

PMA's position regarding the territorial limitations of New York law will not withstand serious examination. In enacting its definitional provisions, the New York legislature did nothing more than recognize that it could not, by its own fiat, govern out-of-state corporations having no activities in New York. That is not to say, however, that those entities could not clothe themselves, by agreement, with the rights, duties, obligations, and protections of New York law.

Federal courts sitting in diversity cases must apply the choice of law rules

of the forum state, here Virginia. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941). Virginia courts will follow contractual choice of law provisions absent some showing of fraud. Wellmore Coal Corp. v. Gates Learjet Corp., 475 F. Supp. 1140, 1144 (W.D. Va. 1979); Tate v. Hain, 181 Va. 402, 25 S.E.2d 321, 324 (1943).

It is fully consistent with Virginia law to apply the New York statutes (as chosen by the parties) notwithstanding any territorial restrictions, implicit or explicit, appearing in those statutes. Extraterritorial application of state franchise-protection statutes has been upheld in comparable circumstances. See C. A. May, supra (Wisconsin statute applied in Georgia); Department of Motor

Vehicles v. Mercedes-Benz of North America, Inc., 408 So. 2d 627 (Fla. App. 1981), appeal after remand, 455 So. 2d 404 (Fla. App. 1984) (New Jersey law governing transfer of automobile dealership franchise applicable in Florida); Boatland, Inc., supra (Wisconsin dealership statute applied in Tennessee); Keller v. Brunswick Corp., 369 N.E.2d 327 (Ill. App. 1977) (Wisconsin statute applied in Illinois). See also Tele-Save Merchandising Co. v. Consumers Distributing Co., 814 F.2d 1120 (6th Cir. 1987) (New Jersey law applied in suit by Ohio franchise against Canadian franchisor pursuant to choice of law provision; franchisee's contention that Ohio law applied rejected); Sullivan v. Savin Business Machines Corp., 560 F.

Supp. 938 (N.D. Ind. 1983) (New York law applied pursuant to agreement; Indiana franchisee's reliance on Indiana franchise practices act rejected); Nardini v. Thrifty Rent-A-Car System, Inc., No. 84 C 10233 (N.D. Ill. June 8, 1987) (available on Westlaw, 1987 WL 12166) (Oklahoma law applied pursuant to agreement; franchisee's reliance on Illinois franchise disclosure act rejected).

PMA relies on a number of decisions in which courts, with little analysis, have declined to apply the statutory law of the chosen state because of territorial restrictions in the statutes. See, e.g., Bimel-Walroth, supra, Swan Sales Corp., supra, Process Accessories Co. v. Balston, Inc., 636 F. Supp. 448

(E.D. Wis. 1986); Gilchrist Machinery Co., supra; Bunch v. Artec International Corp., 559 F. Supp. 961 (S.D.N.Y. 1983); Premier Wine & Spirits v. E. & J. Gallo Winery, 644 F. Supp. 1431 (E.D. Cal. 1986), affirmed, 846 F.2d 537 (9th Cir. 1988).

The court of appeals in this case should have applied the New York statutes in dealing with PMA's attempted termination, and should, therefore, have affirmed the district court's award of summary judgment to EAD. EAD and PMA placed themselves within the ambit of the relevant statutes by their conscious choice of New York law.

The decision in C. A. May, supra, is extremely well-reasoned. This Court should adopt that reasoning and thereby

settle conflicting decisions in the circuits and give clear guidance to all contracting parties as to the true meaning and proper interpretation of choice of law provisions.

In C. A. May, an agreement between a Georgia dealer which sold outboard motors in that state and a Wisconsin manufacturer provided that Wisconsin law would apply. After a twenty-year relationship, the Wisconsin manufacturer notified the dealer it would not renew the franchise agreement upon expiration. The Georgia dealer sued in the United States District court for the Northern District of Georgia, alleging that the manufacturer's refusal to renew violated the Wisconsin Fair Dealership Law, which

prohibited such termination without good cause.

The manufacturer, like PMA in the present case, contended the Fair Dealership Law was intended to, and did, protect only dealers selling motors in Wisconsin, and relied on the 1975 decision of the United States District Court for the Middle District of Tennessee in Boatland, Inc. v. Brunswick Corp.[1]

In C. A. May, the court of appeals assumed the Wisconsin legislature intended only to protect dealers doing

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[1] The district court in Boatland later was reversed. 558 F.2d 818 (6th Cir. 1977). This reversal had not yet occurred at the time C. A. May was decided, and the Fifth Circuit was confronted with the district court's interpretation of Wisconsin law.

business in Wisconsin, and nevertheless held that the parties had, by agreement, made the Wisconsin law applicable to their relationship, stating:

> The [manufacturer] further argues that, even if Wisconsin law must govern the contract, [the dealer] still is not protected by the dealership law because it was not the intention of the Wisconsin legislature to extend protection to out-of-state dealers. The argument has surface appeal, but is decidedly a red herring. Obviously, the legislature passed the law to protect Wisconsin dealers, and had no concern for protecting the termination rights of dealers such as plaintiff. But that does not mean that parties, one or both of which have some reasonable contact with the State of Wisconsin, may not agree to clothe themselves with the rights and duties of citizens of that state when determining their respective rights under their contract, (citations omitted). No state intends to govern the

> transactions of citizens of other states when it establishes laws governing contractual relations between parties. When, however, parties to a contract have contact with more than one state, the parties are expected, and encouraged, to stipulate which state's substantive law will govern. Obviously, when such agreement occurs, both parties are bound as well as protected by the state law stipulated. The [manufacturer] seems to believe that it may receive the benefits of Wisconsin law but that plaintiff may not, because it is not a Wisconsin corporation. It suffices to point out that such a notion would effectively emasculate all contractual choice of law provisions...

557 F.2d at 1166-67 (citations omitted) (emphasis added). The Distributor Agreement has the requisite contact with New York to make the parties' choice of law logical and valid. PMA's predecessor, Peugeot, Inc., was a New

York corporation at the time it entered into the Distributor Agreement with EAD. Further, New York has a clearly expressed statutory policy encouraging contracting parties to stipulate the applicability of New York law to significant commercial transactions, "whether or not such contract... bears a reasonable relation" to New York. N. Y. Gen. Oblig. Law §5-1401. The legislature history of Section 5-1401 shows that its purpose is "to encourage the parties to significant commercial, mercantile or financial contracts to choose New York law," and recognizes that "it is important...that the parties be certain that their choice of law will not be rejected...." McKinney's Session Laws of New York 1984,

ch. 421, Legislative Memorandum at 3288 (A69-A77).

The Restatement (Second) of the Conflict of Laws fully supports EAD's position. Section 187 requires that the "local" law of New York be applied to the Distributor Agreement. The New York statutes in question are substantive, are specifically applicable to the business of these parties, and are a part of New York's "local" law. Therefore, the Fourth Circuit should have applied the statutes and affirmed the district court's grant of summary judgment.

CONCLUSION

The Fourth Circuit's decision in this case creates uncertainty regarding the efficacy of contractual choice of law provisions, and unnecessarily complicates

transactions in interstate and international commerce. Thousands of businesses and commercial ventures across the nation rely on and intend for choice of law provisions to delineate their contractual rights and obligations. The Fourth Circuit, in vacating summary judgment for EAD, ignores the express intention of these parties to subject themselves to New York law. The split in the Fourth Circuit panel evidences the complexity of the question reflecting the irreconcilable conflict between the Fifth Circuit in C. A. May and the Sixth Circuit in Bimel-Walroth. The logical underpinnings of C. A. May and Bimel-Walroth are directly at odds with one another. This conflict will not be resolved until this Court rules on the

issues presented in this Petition. This Petition literally presents an issue of paramount importance in the commercial world. For these reasons, EAD respectfully urges the Court to grant certiorari.

Respectfully submitted,

EASTERN AUTO DISTRIBUTORS, INC.

Dated: May 22, 1990 By: _____
Counsel

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 29.3 of the Rules of the United States Supreme Court, and on this 24th day of May, 1990, three true and accurate copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT have been mailed to each of the following counsel, who constitute all parties who are required to be served:

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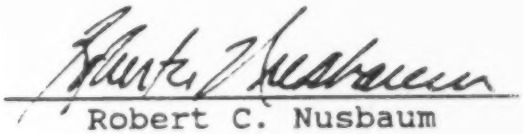

Robert C. Nusbaum

FILED
JUL 25 1988

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Norfolk Division

PEUGEOT MOTORS OF AMERICA, INC.,

Plaintiff,

v. JUDGMENT IN A CIVIL CASE

EASTERN AUTO DISTRIBUTORS, INC.,

CASE NO.:
Civil Action No.: 87-785-N

Defendant.

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(x) Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered, and there having been a finding that there is no just reason (sic) delay of entry of final judgment.

IT IS ORDERED AND ADJUDGED that judgment is entered as follows:

> for the plaintiff on plaintiff's motion for partial summary judgment on defendant's counterclaims one and five as to each item or claim, except the Hertz Transaction; that the Hertz Transaction is severed and stayed until expiration of the time for appeal or the determination of any appeals from such summary judgment; and for final judgment in favor of Eastern Distributors, Inc. on its motion for summary judgment against the plaintiff on the complaint.

July 25, 1988 — Doris R. Casey, Clerk
Date — Clerk

Form of judgment approved

this 25th day of July, 1988.

/s/ Bonnie L. Day
(By) Deputy Clerk

/s/ Richard B. Kellam
United States District Judge

FILED
JUL 20, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

PEUGEOT MOTORS OF AMERICA, INC.,

Plaintiff,

v. Civil Action No. 87-785-N

EASTERN AUTO DISTRIBUTORS, INC.,

Defendant.

OPINION AND ORDER

Before the Court for determination are plaintiff's and defendant's motions for partial summary judgment in this case. Plaintiff seeks partial summary judgment as to some forty (40) items alleged as a basis of recovery by defendant in its counterclaims one and

five, and defendant seeks partial summary judgment against plaintiff on plaintiff's complaint and on counterclaims two and four.

I.

Plaintiff's motion for partial summary judgment on counterclaims one and five of defendant's counterclaims go to each item or claim made by defendant pursuant to the Automobile Dealer's Day in Court Act, 15 U.S.C. §§1221-1225 (1982) (DDICA) and the breach of contract action, except the claim or item described as the "Hertz Transaction." The grounds of plaintiff's motion are that all of these claims except the Hertz Transportation claim: (a) were or could have been asserted at the time of trial of the case of Eastern Auto Distributors,

Inc. (EAD) v. Peugeot Motors of America, Inc. (PMA), tried in this Court and fully disposed of by the opinion of the Fourth Circuit, 795 F.2d 329 (4th Cir. 1986); (b) they are barred by the statute of limitations; (c) defendant is estopped from again raising these claims; and (d) defendant admits it can prove no damages suffered and does not seek to recover any damages therefor.

From argument presented by defendant, it seeks to present evidence of said events to show prior conduct of PMA relating to other issues in the case. The issue, so far as defendant contends, and plaintiff as well, is really one dealing with the admissibility of evidence rather than one for relief, and has nothing to do with a cause of action

or right to recover damages. The motion for partial summary judgment is GRANTED as to counterclaims one and five as to each item or claim except the Hertz Transaction. The Court does not here rule whether evidence of the events or other claims there asserted is or is not admissible to establish a pattern of conduct. This will await trial.

II.

Defendant's motion for summary judgment in this case seeks to have the Court rule as a matter of law that PMA has no right, nor has properly exercised any right, to cancel or refuse to renew the Distributor Agreement of January 1, 1971. Additionally, EAD requests permanent injunctive relief against PMA's termination, cancellation or non-renewal

of said Distributor Agreement as sought in its second and fourth counterclaims, alleging PMA's violation of New York General Business Law §197, and New York Franchised Motor Vehicle Dealer Act, New York Vehicle and Traffic Law §460, et seq., respectively.

This Court (Clarke, J.) stated previously in an Order issued April 15, 1988, denying PMA's motion to dismiss, that EAD has causes of action under three New York statutes. Order p.11.

New York Vehicle and Traffic Law §433(2)(d)(1) provides in pertinent part that:

> It shall be unlawful for any franchisor:
> To terminate, cancel or refuse to renew the franchise of any franchised motor vehicle dealer except for due cause regardless of the terms of the franchise....

(emphasis added).

EAD asserts that PMA has failed to assert that it has such cause and is entitled to summary judgment in its favor on PMA's complaint.

Upon review of memorandum submitted by the parties and the subsequent argument on the motion, the Court is of the opinion that PMA has in fact failed to assert that it had due cause pursuant to New York Vehicle and Traffic Law §433(2)(d)(1). PMA denies that this New York law is applicable to the case and therefore makes no contentions regarding cause to terminate.

Pursuant to a 1963 amendment to Rule 56(c), "answers to interrogatories" were specifically included among the materials

which may be considered on a motion for summary judgment.

Interrogatory No. 1 of EAD's Third Interrogatory to Plaintiff, served on April 22, 1988, inquired as follows:

> Does PMA contend that it had cause to either terminate or fail to renew EAD's Distributorship Agreement? If so, state the facts which constituted the basis of such cause.

PMA's answer to interrogatory, served May 24, 1988, responds in pertinent part as follows:

> For the purposes of this Interrogatory, PMA interprets "cause" as used in said Interrogatory to mean cause as the term is used in the New York statutes which defendant asserts (and which plaintiff denies) are applicable to this case. PMA has not attempted to terminate EAD. Accordingly, it will make no contentions in this action regarding "cause" to terminate. PMA had advised EAD, pursuant to Paragraph 32 of the Distributor Agreement, and said agreement will not be renewed.

> PMA contends that "cause" is not required for such non-renewal. Accordingly, it will make no contentions in this action regarding "cause" as respects said non-renewal
>
> . . . .

Obviously, PMA's answer rests on its assertion that the New York statutes are inapplicable. PMA contends that its actions constitute a "non-renewal" rather than a "termination" of EAD's franchise and accordingly that §197 of New York General Business Law is inapplicable. It is PMA's position that the Automobile Dealers Day in Court Act (DDICA) 15 U.S.C. §1222, is the proper statute by which to judge its actions. The DDICA deals with a standard of "good faith" rather than "due cause" when applied to terminating, cancelling or not renewing a franchise. As a result, the DDICA provides PMA with a much more favorable

standard than the applicable New York statutes. Failure to exercise good faith within the meaning of the DDICA has a limited and restrictive meaning and is not to be liberally construed. Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901, 911 (9th Cir.) cert. denied, 436 U.S. 946 (1978); McGeorge v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir. 1974), cert. denied, 410 U.S. 992 (1975).

However, pursuant to Judge Clark's Order, EAD has stated a cause of action under the New York statutes and those statutes govern this case. As a result, determination of whether a genuine issue of material fact exists must be made in accordance with those statutes. As stated previously, PMA fails to offer any evidence beyond what it proffered on its

earlier motion to dismiss. PMA has presented no grounds for the Court to alter the conclusion it expressed in denying PMA's motion to dismiss. The New York statutes are applicable and PMA has failed to raise a genuine issue amounting to due cause to terminate EAD's franchise agreement.

Accordingly the Court ORDERS that the claim concerning the Hertz Transaction be severed and stayed until final determination of all appeals from such summary judgment (if any party shall appeal there from) and otherwise until the expiration of the time for appeal, and that defendant EAD's motion for summary judgment on the complaint be, and hereby is, GRANTED. There being no just reason for delay, it is directed that

judgment be entered on the claims hereby resolved.

Copy of this order and opinion is forwarded to counsel.

/s/ Richard B. Kellam

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

July 19th, 1988

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2598

PEUGEOT MOTORS OF AMERICA, INC.,

Plaintiff-Appellant,

versus

EASTERN AUTO DISTRIBUTORS, INC.,

Defendant-Appellee.

No. 88-2604

PEUGEOT MOTORS OF AMERICA, INC.,

Plaintiff-Appellant,

versus

EASTERN AUTO DISTRIBUTORS, INC.,

Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, Senior District Judge.
(CA-87-785-N)
Argued: March 7, 1989

Decided: December 19, 1989

Before WIDENER, HALL, and WILKINS, Circuit Judges.

John Y. Pearson, Jr. (Conrad M. Shumadine, James J. Wheaton, Randy D. Singer, WILLCOX & SAVAGE, P.C.; Peter S. Paine, Jr., Peter Mozarsky, CLEARY, GOTTLIEB, STEEN & HAMILTON, on brief) for Appellant. Arthur S. Linker (Max Freund, Robert W. Gottlieb, ROSENMAN & COLIN; Robert C. Nusbaum, Thomas F. McPhaul, Joseph R. Lassiter, Jr., William F. Devine, Beth Hirsch Berman, HOFHEIMER, NUSBAUM, MCPHAUL & SAMUELS, on brief) for Appellee.

WIDENER, Circuit Judge:

In 1971, Eastern Auto Distributors, Inc. (Eastern) entered into a Distributor Agreement with the corporate predecessor of Peugeot Motors of America, Inc. (Peugeot). On October 14, 1987, Peugeot sent a notice of non-renewal to Eastern. On November 9, 1987, Peugeot filed its complaint asking for a declaratory judgment that it properly exercised its rights under the contract not to renew. Eastern filed a five-count counterclaim alleging that Peugeot's action violated the Automobile Dealer's Day in Court Act (15 U.S.C. §§ 1221-1225); §§ 197 and 197-a of New York's General Business Law; and the New York Franchised Motor Vehicle Dealer Act (N.Y. Veh. & Traf. Law 460-

471); and also alleged a breach of contract. The district court granted Eastern summary judgment on Peugeot's declaratory judgment claim.[1] It also granted Peugeot's motion for summary judgment on Eastern's Dealer's Day in Court counterclaim and its breach of contract counterclaim,[2] all the remaining parts of Eastern's case.

Both sides appeal from the district court's decision. Peugeot argues that

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[1] Review of the district court's action granting Eastern summary judgement on Peugeot's complaint effectively disposes of Eastern's counterclaims two, three, and four which are merely the counter arguments (under New York statutes) to Peugeot's complaint.

[2] The district court severed from counts one and five of Eastern's counterclaims the "Hertz Transaction" which awaits trial. That transaction is not before this court.

the district court erred as it applied the New York regulatory law in this case,[3] that New York common law permits the non-renewal, that the contract's specific non-renewal terms should be applied, and that even if the New York

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[3] Eastern argues that Peugeot should be judicially estopped from contending that the New York regulatory schemes do not apply in this action. Eastern claims that Peugeot urged the applicability of the statutes during the course of the 1981 litigation. We believe that a fair reading of the record would be that Peugeot acquiesced in a good cause standard. The standard would not necessarily have been based on the New York regulatory statutes since the prior case was in part dealing with a partial termination of the Delaware territory and the contract may be said to require cause for a termination. Judicial estoppel is used to prevent a party from playing fast and loose with the courts and it should be applied with caution. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166-67 (4th Cir. 1982). We do not think that Peugeot is playing fast and loose with the court and decline to invoke judicial estoppel.

regulatory law applies, there was no violation under these facts. Eastern's cross-appeal argues that the district court improperly granted summary judgment on its Dealer's Day in Court and breach of contract counterclaims. Being of the opinion that the New York regulatory law was not properly applied in this case and that New York's common law permits the challenged non-renewal, we vacate the district court's summary judgment in favor of Eastern in Peugeot's declaratory judgment action. We are also of opinion that the district court properly granted summary judgment on Eastern's breach of contract counterclaim as well as on the Dealer's Day in Court counterclaim, with an exception to be hereinafter noted. So, subject to the exception, we largely

affirm the district court's action granting summary judgment to Peugeot on Eastern's counterclaims one and five.

Peugeot, a Delaware corporation with its principal place of business in New Jersey, imports Peugeot automobiles into the United States and distributes them through a network of enfranchised dealers in states where Eastern is not the distributor. For over twenty-five years, Eastern, a Virginia corporation, has distributed Peugeot products in West Virginia, Virginia, North Carolina, South Carolina, Maryland, Kentucky, Tennessee, Delaware, the District of Columbia, and the northern part of Georgia. Eastern has never sold or distributed vehicles in New York. Eastern has never registered under New York's regulatory laws to be a

dealer in New York, nor has it qualified to do business as a foreign corporation in New York.

On January 1, 1971, Peugeot and Eastern entered into a Distributor Agreement which is the subject of the present dispute. There are two relevant contractual provisions. The first is the non-renewal provision, paragraph thirty-two of the contract, which states:

> Unless terminated by any other provision, this agreement shall continue for a period of one year from the effective date set forth at the foot of the agreement [January 1, 1971] and shall be renewed automatically from year to year thereafter unless either party gives at least 60 days' written notice to the other that it shall not be so renewed.

The second relevant provision is paragraph thirty-nine, the choice of law provision, and provides that "[i]t is the

express intention of the parties hereto that this agreement shall be governed by the laws of the State of New York."

The relationship between Peugeot and Eastern became strained in the late 1970's and on July 1, 1981, Eastern sued Peugeot alleging Dealer's Day in Court violations, Robinson-Patman Act (15 U.S.C. § 13) violations, other antitrust violations, civil conspiracy claims and breach of contract claims. Peugeot counterclaimed alleging antitrust claims and breach of contract claims. See Eastern Auto Distrib. v. Peugeot Motors of America, 795 F.2d 329 (4th Cir. 1986). Prior to trial the district court dismissed all the antitrust claims and Eastern's civil conspiracy claim. Id. at

331. After trial, before a magistrate[4] and a jury, the magistrate directed a verdict against Eastern on the Robinson-Patman Act claims and all Dealer's Day in Court claims except one involving a training facility. The jury returned a verdict for Eastern on its breach of contract claims regarding vehicle shortages and Peugeot's actions regarding the Delaware territory included in the agreement. The jury verdict was for Peugeot on all remaining claims. The magistrate granted judgment notwithstanding the verdict in favor of Peugeot on the contract claim based on the stock shortages. Both sides appealed

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[4] The parties consented to the transfer of the case from the district court to the magistrate.

and we affirmed except the district court was empowered to enter injunctive relief regarding the Delaware territory. Eastern Auto Distrib. v. Peugeot Motors of America, 795 F.2d 329, 340 (4th Cir. 1986).

The relationship continued to be strained. On October 14, 1987, as stated, Peugeot sent notice of non-renewal to Eastern stating that pursuant to the non-renewal clause of the Distributor Agreement the contract would not be renewed on its expiration on January 1, 1988. The current action followed.

We first decide which state law is applicable. A federal court sitting in diversity must apply the choice of law rules of the forum state. Klaxon Co. v.

Stentor Elect. Mfg. Co., 313 U.S. 487, 496-97 (1941). Since the action was filed in the Eastern District of Virginia, Virginia's choice of law rules apply. Virginia gives effect to parties' choice of law in a contract unless circumstances show a fraudulent purpose. Tate v. Hain, 25 S.E.2d 321, 324 (Va. 1943). There being no fraudulent purposes shown we give effect to the parties' choice to have New York law apply to the contract.

We next address the proper application of New York law. Absent some controlling statutory scheme, New York has traditionally enforced unrestricted termination clauses in contracts as written. A.S. Rampell Inc. v. Hyster Co., 144 N.E.2d 371, 379 (N.Y. 1957).

Although the case at bar deals with a non-renewal clause as opposed to a termination clause, we believe New York would treat the two very similar situations the same. Eastern argues that §§ 197 and 197-a[5] of New York's General

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[5] The New York legislature repealed §§ 197 and 197(a) effective April 24, 1988. Peugeot sent the notice of the non-renewal in question on October 14, 1987, to prevent the automatic renewal on January 1, 1988. The present suit was filed on November 9, 1987. Although the district court issued an injunction preventing the severance of the contractual relationship until there is a final non-appealable judgment entered regarding the case, the injunction by its own terms does not affect in any manner the disposition of the case. N. Y. Gen. Constru. Law § 94 addresses the impact of a statutory repeal on a pending case under New York law. It states that:

> Unless otherwise specially provided by law, all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking

Business Law as well as the New York Franchised Motor Vehicle Act apply and control over the contract's non-renewal clause.[6] Given that N. Y. Business Law §§ 197-197-a and the N. Y. Franchised Motor Vehicle Dealer Act are very similar, we will address their applicability to the dispute together.

> effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed.

In this case the notice of non-renewal, the effective date of the purported non-renewal, and the filing of the lawsuit all occurred well before the repeal of §§ 197 and 197(a); therefore, in accordance with the N. Y. Gen. Constr. Law § 94, the repeal has no impact on the present case.

[6] There is no dispute that if the contract's non-renewal clause is to be applied as written Peugeot properly notified Eastern in writing well before the required 60 day period that the contract was not going to be renewed.

Both of these regulatory acts have explicit geographic limitations. Section 197-a prohibits a non-renewal of a motor vehicle franchise contract to a distributor except in good faith. Section 195 defines a distributor as one who "sells or distributes in this state." Likewise, § 463(2)(d)(1) prohibits non-renewal of a franchise of any "franchised motor vehicle dealer" except for due cause. Section 462(7) defines "franchised motor vehicle dealer" as "any person required to be registered pursuant to section four hundred fifteen of this chapter." Section 415(3) requires registration only if the dealer intends

to engage in business "in this state."[7] Eastern has never done business in New York. It has never registered pursuant to New York law as a motor vehicle dealer or distributor. The New York regulatory schemes with explicit geographical limitations do not apply to this contract between two parties outside the state of New York. Bimel-Walroth Co. v. Raytheon Co., 796 F.2d 840 (6th Cir. 1986); Gilchrist Machinery Co. v. Komatsu America Corp., 601 F. Supp. 1192 (S.D.

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[7] The New York legislature's findings are found in § 460 and indicate that the regulations were adopted because "the distribution and sale of motor vehicles within this state vitally affects the general economy of the state. . . [and] is necessary. . . to protect and preserve the investments and properties of the citizens of this state." The statute is in terms ". . . in the exercise of its [New York's] police power."

Miss. 1984).[8] Given that the two New York regulatory schemes by their own terms do not apply to the dispute, New York common law controls, and there is nothing in New York law to indicate that Peugeot did not act properly under the contract regarding its notice of non-renewal.

We next consider the propriety of the district court's grant of Peugeot's motion for judgment on Eastern's Dealer's Day in Court and

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[8] Eastern depends on opinions in C.A. May Marine Sup. Co. v. Brunswick Corp., 557 F.2d 1163 (5th Cir. 1977) and Boatland, Inc. v. Brunswick Corp., 558 F.2d 818 (6th Cir. 1977). they are not persuasive, however, because they interpreted the Wisconsin Fair Dealership Law §§ 135.02, et seq., before the Wisconsin legislature amended to ac to insert an explicit geographical limitation. See Bimel-Walroth, 796 F.2d at 842-843.

breach of contract counterclaims. Peugeot moved for summary judgment on several grounds including res judicata, statute of limitations, estoppel, and that the defendant could prove no damages. The district court granted Peugeot's motion without clearly stating upon which ground or grounds it relied.

We first address the issue of res judicata. The complaint in the 1981 litigation which alleged Dealer's Day in Court violations and contractual breaches among other things is strikingly similar to the current counterclaims alleging Dealer's Day in Court claims and contractual breaches. Res judicata "is not a technical rule but a rule of 'fundamental and substantial justice' of public policy and private peace 'which

should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way.'" Nash Cty. Bd. of Ed. v. Biltmore Co., 640 F.2d 484, 486 (4th Cir.), cert. denied, 454 U.S. 878 (1981), quoting Montana v. United States, 440 U.S. 147, 153 (1979), and Hart Steel Co. v. Railway Supply Co., 244 U.S. 294, 299 (1917). Not only does res judicata bar claims that were raised and fully litigated, it "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felson, 442 U.S.

127, 131 (1979). Courts presume that a litigant has "done his legal and factual homework" and raised all grounds arising out of the same factual context to support his claims. Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 596 (7th Cir. 1986). Eastern raises several factual allegations which were either fully litigated or in existence at the time of the 1981 litigation. These include allegations that: Peugeot in 1981 wrongfully removed the state of Delaware from Eastern's area, Peugeot in 1974 attempted to terminate the distributorship, Peugeot in 1975 attempted to force Eastern to accept changes in the contract, Peugeot in 1977 and 1978 attempted to purchase Eastern, and that Peugeot filed baseless

counterclaims in the 1981 case. Such claims or claims based on such facts are forever extinguished by the final judgment in the 1981 case.

Eastern raises two allegations which involve alleged continuing actions on the part of Peugeot which were litigated in the prior suit but have continued to the present suit. One is with respect to Peugeot's sales incentive policy, started in 1979, which required Eastern to pay for 25% of the cost of the program for its dealers. The policy existed prior to the 1981 litigation and was raised by the 1981 complaint. The second allegation is that since 1974 Peugeot engaged in a "continuous, unfair and inequitable scheme" designed to drive Eastern out of business. Eastern alleged

virtually the same thing in the 1981 complaint: that since 1978 Peugeot engaged in a whole range of activities with "intent to coerce, intimidate" and force Eastern out of business. Both of these counterclaims involve many of the same facts actually litigated in the prior suit. They do, however, contain events that occurred after the 1981 suit. We do not believe that the mere fact that Peugeot's questioned policies continued after the 1981 litigation allows Eastern to make the same legal claim about the same policies that were litigated and on account of which relief was denied in prior litigation. See Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 596 n.10 (7th Cir. 1986). The Seventh Circuit reasoned that the fact a later complaint

alleged actions extending after the first suit was "unimportant." It held that "some chronological overlap" coupled with the fact that the "two complaints arise out of the same common nucleus of operational fact" resulted in the claims being barred by res judicata.

The only remaining allegations in Eastern's first and fifth counterclaims not barred by res judicata involve either the Hertz Transaction or the 1987 non-renewal as violating the Dealer's Day in Court Act. The Hertz Transaction was severed from the remaining action and the summary judgment does not apply to it.

This leaves us with the Dealer's Day in Court claim, which is the first counterclaim. We first note that

Eastern has acknowledged that it can prove no damages with respect to that claim, so any part of the claim relating to damages will not be litigated. Eastern depends upon the affidavit of one Blocker, its Chairman of the Board and President at all relevant times, to supply facts sufficient to prevent a summary judgment being granted. We have examined the affidavit of Blocker with some care and find that nearly every allegation in the affidavit is either based on facts which were or could have been litigated in the 1981 case or consist simply of the same claims which were litigated in the 1981 case. Thus, nearly all of Eastern's Dealer's Day in Court claim is barred by res judicata.

The only exception to barring

the entire claim of Eastern with reference to the Dealer's Day in Court claim is that part of the claim with respect to the Hertz Transaction. Especially in view of the fact that Eastern claims no damages for its Dealer's Day in Court claim and that nearly all of its claim is barred by res judicata, it may seem doubtful that any part of the claim could survive. The district court, however, did not address any factual underpinnings of that claim and whether any construction of the pleadings could be said, if factually supported, to provide an inference of failure to act in good faith in not renewing the franchise in question under 15 U.S.C. § 1522 and the case law. We do not suggest that Eastern's Dealer's Day

in Court claim is either subject to summary judgment or not subject to it. We do observe, however, that the matter has not been treated, and thus we are left with a more or less naked procedural allegation (which itself has not been critically examined) with respect to the Hertz Transaction, as the facts developed with respect to the Hertz Transaction may find themselves under the Dealer's Day in Court Act.

In the proceedings after remand in the district court, so far as Eastern's Dealer's Day in Court claim may be based solely on facts with respect to the Hertz Transaction, it should not be held to be barred by res judicata. Otherwise, Eastern's entire Dealer's Day in Court claim is so barred.

We note that while one might expect judgment to be entered in favor of Peugeot in its declaratory judgment action because there is no reason, under New York law, that it should be required to renew the agreement in question, such is not quite the case. The remaining part of the Dealer's Day in Court Act claim, which must be treated in this case as it asks for injunctive relief, is rather a defense to the declaratory judgment action of Peugeot. Thus, it is conceivable that although Peugeot had a right not to renew the agreement under New York law, an injunction might issue under the Dealer's Day in Court Act preventing the non-renewal.

The judgment of the district court in favor of Eastern on Peugeot's

declaratory judgment action is vacated; its judgment in favor of Peugeot on the contractual and Dealer's Day in Court counterclaims is affirmed, with the exception of that part of such claim as may relate to the Hertz Transaction as set forth above. The case is remanded to the district court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART;

VACATED IN PART; and

REMANDED WITH INSTRUCTIONS.

HALL, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority opinion to the extent that it vacates the lower court's declaratory judgment because I believe that the parties' choice of New York law should be interpreted to include an agreement to be bound by New York's statutes governing the non-renewal of automobile dealerships. The majority's refusal to apply the New York non-renewal statutes, based on "explicit geographical limitations" in the definition section of that state's code, is the result of a strained statutory construction and of a failure to focus on the intent of the contracting parties.

The majority recognizes, and I agree, that the contractual choice of New York law should, under the forum state's (Virginia) choice of law rules, be given effect. I also agree with the majority's determination that, absent a controlling statute to the contrary, New York law would uphold the unrestricted termination clause in the Peugeot-Eastern dealership contract. My disagreement stems from the majority's constrictive reading of the New York statutes to limit the parties' contractual choice of law to only that state's common law and those statutes which can somehow be read to have been intended by New York to have no territorial limitation.

The majority declines to give effect to the parties' choice of New York

law with regard to the non-renewal statutes because the definition section of the regulatory scheme defines "distributor" as one who "sells or distributes in this state" and "franchised motor vehicle dealer" as one who is "required to be registered in this state." Slip op. 8-9. Because Eastern had never done business in New York,[1] the majority finds that the statutes, "by their own terms do not apply to the dispute. . . ." Slip op. 9. The case cited by the majority, however, make it clear that the underpinning for this holding is that the New York legislature

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[1] Peugeot, however, does do business in New York; moreover, it is the successor (by 1974 merger) to Peugeot, Inc., a New York corporation with which Eastern executed the 1971 contract involved in this case.

did not intend that these statutes have extraterritorial effect.

The primary authority upon which the majority relies, Bimel-Walroth Co. v. Raytheon Co., 796 F.2d 840 (6th Cir. 1986), proceeded from the premise that a state legislature may affirmatively restrict the use of its laws to govern a contract and held that Wisconsin did just that with regard to its Fair Dealership Law. The Sixth Circuit's analysis is based on a lower state court opinion which made an in-depth analysis of the legislative history of the 1977 amendments to the Wisconsin law. In Swan Sales Corp. v. Jos. Schlitz Brewing Co., 126 Wis.2d 16, 374 N.W.2d 640 (Wis. Ct. App. 1985), the court found that a territorial-restrictive definition

of "dealer" was clearly intended to confine the benefits of the Fair Dealership Law's termination provisions to Wisconsin dealers only. Aside from the bare language of the definitional provisions of New York's statutes, however, no showing has been made that New York affirmatively intended to deprive outside parties from choosing New York law. If anything, New York has clearly evinced a desire to have its laws chosen as governing contracts.[2] Even if

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[2]. N.Y. Gen. Obligations Law § 5-1401 (1984) provides as follows:

> 1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one

it is assumed that a state legislature may act to withhold its enactments from use by contracting parties, New York has not done so.

Most if not all regulatory schemes like New York's could be tied to

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of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code.

2. Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement, or undertaking.

similar territorial restrictions because statutes are not normally enacted to affect the legal rights and duties of parties with no relationship to that state.[3] In C. A. May Marine Supply Co.

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[3] For instance, each state in the Fourth Circuit also presently has a statutory prohibition against the termination or non-renewal of motor vehicle dealership contracts without good cause, regardless of the terms of the franchise agreement: Va. Code Ann. §46-2-1569(5) (1989); N. C. Gen. Stat. § 20-305(6) (1988); Md. Transp. Code Ann. §15-209(a) (1984); S.C. Code Ann. §56-15-40(3)(c) (Law. Co-op. 1977); W. Va. Code §17A-6A-4(1)(a)(1986). Each of these states' statutes, moreover, has some "explicit geographical limitation" which arguably would, under the analysis put forward in the majority opinion, circumvent the good cause requirement if the laws of any one of these states had been chosen by the parties to govern their contract: Va. Code Ann. §46-2-1500 ("Distributor means a person who sells or distributes new motor vehicles pursuant to a written agreement with the manufacturer, to franchised vehicle dealers in the Commonwealth."); N. C. Gen. Stat. §20-286(3) (1988)

v. Brunswick Corp., 557 F.2d 1163, 1166 (5th Cir. 1977), the court discussed a similar argument in the following manner:

> The defendant further argues that, even if Wisconsin law must govern the contract, plaintiff still is not protected by the dealership law

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("'Distributor' and 'wholesaler' mean a person...who sells or distributes motor vehicles to motor vehicle dealers in this State..."); S. C. Code Ann. §56-15-10(g) (1988 Cum Supp.) ("'Distributor' [means] any person who sells or distributes new motor vehicles to motor vehicle dealers or who maintains distributor representatives within the State."); Md. Transp. Code Ann. §11-112 (1984) ("'Distributor' means any person who: (1) Sells or distributes to dealers in this State new vehicles of a type required to be registered under Title 13 of this article; or (2) Maintains distributor representatives in this State for these purposes."); W. Va. Code §17A-6A-3 (1986) ("'New motor vehicle dealer' means a person who holds a dealer agreement granted by a manufacturer or distributor for the sale of its motor vehicles...and who has an established place of business in this State.")

> because it was not the intention of the Wisconsin legislature to extend protection to out-of-state dealers. The argument has surface appeal, but is decidedly a red herring. Obviously, the legislature passed the law to protect Wisconsin dealers, and had no concern for protecting the termination rights of dealers such as plaintiff. But that does not mean that parties, one or both of which have some reasonable contact with the State of wisconsin, may not agree to clothe themselves with the rights and duties of citizens of that state when determining their respective rights under their contract . . . . No state intends to govern the transactions of citizens of other states when it establishes laws governing contractual relations between parties. When, however, parties to a contract have contact with more than one state, the parties are expected, and encouraged, to stipulate which state's substantive law will govern. Obviously, when such agreement occurs, both parties are bound as well as protected by the state law stipulated.

(Citations omitted.) Peugeot contends that C.A. May is no longer good law in

light of the subsequent amendments to the Wisconsin statute adding the territorial restriction. See Swan Sales; Bimel-Walroth. The Fifth Circuit, however, clearly indicated that the legislature's intent to limit the statute's protective scope vel non was irrelevant. I am persuaded that the analysis of the Fifth Circuit in C. A. May is more in line with the realties of both lawmaking and commerce.

By contracting, Peugeot and Eastern agreed to be bound by the various terms of their agreement. The choice of New York law essentially amounts to an agreement to incorporate that state's laws, both statutory and common, into the contract itself. Accordingly, I would affirm the declaratory judgment of the

district court on the ground that the New York non-renewal statutes apply to Peugeot's attempted termination of its distributorship agreement with Eastern. Because Eastern's counterclaims two, three, and four are essentially defenses or counter arguments to Peugeot's declaratory judgment action, I would affirm the lower court's grant of Eastern's motion for summary judgment as to such counterclaims. I concur in the majority opinion to the extent that it affirms the district court's order granting summary judgment to Peugeot on Eastern's counterclaims 1 (breach of contract) and 5 (Dealer's Day in Court).

FILED
FEB 27 1990

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2598

PEUGEOT MOTORS OF AMERICA, INC.,

Plaintiff-Appellant,

versus

EASTERN AUTO DISTRIBUTORS, INC.,

Defendant-Appellee.

No. 88-2604

PEUGEOT MOTORS OF AMERICA, INC.,

Plaintiff-Appellant,

versus

EASTERN AUTO DISTRIBUTORS, INC.,

Defendant-Appellee.

ORDER

Upon a request for a poll of the court on the petition for rehearing en banc, Judges Hall and Sprouse voted in favor of rehearing en banc, while Judges Ervin, Russell, Widener, Phillips, Murnaghan, Chapman, Wilkinson and Wilkins voted against rehearing en banc.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and the same hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrence of Judge Wilkins.

Judge Hall dissents. He would grant rehearing for the reasons set out in his dissenting opinion.

/s/ H. E. Widener, Jr.

For the Court

New York General Business Law,
Article 11-A - Motor Vehicle Manufacturers

§195.
Definitions
As used in this article:

(a) "Manufacturer" means any person, firm or corporation, whether resident or nonresident, who manufactures or assembles motor vehicles for sale or distribution in this state.

* * *

(c) "Distributors" means a person, firm or corporation, whether resident or nonresident, who in whole or in part, sells or distributes in this state motor vehicles to motor vehicle dealers.

(d) "Dealer" means any person, firm or corporation selling or agreeing to sell in this state one or more motor vehicles under a retail agreement with a manufacturer, manufacturer branch, distributor or distributor branch, or the agent of any of them.

* * *

§197. Termination of contracts for sales of motor vehicles

No manufacturer or distributor, or any agent of such manufacturer or distributor, shall terminate any contract, agreement, or understanding or renewal thereof for the sale of new motor vehicles to a distributor or dealer, as the case

may be, except for cause.

§197-a.
Non-renewal of contracts for the sale of motor vehicles

No manufacturer or distributor, or any agent of such manufacturer or distributor shall, in the case of contracts executed on or after the effective date of this act [September 1, 1970], fail or refuse to renew any contract, agreement, or understanding for the sale of new motor vehicles to a distributor or dealer, as the case may be, except in good faith.

New York Vehicle and Traffic Law, Article 17-A - Franchised Motor Vehicle Dealer Act

§460. Legislative findings

The legislature finds and declares that the distribution and sale of motor vehicles within this state vitally affects the general economy of the state and the public interest and the public welfare, and that in order to promote the public interest and the public welfare and in the exercise of its police power, it is necessary to regulate motor vehicle manufacturers, distributors and factory or distributor representatives and to regulate dealers of motor vehicles doing business in this state in order to

prevent frauds, impositions, and other abuses upon its citizens and to protect and preserve the investments and properties of the citizens of this state.

§461. Short title

This article shall be known and may be cited as the "franchised motor vehicle dealer act."

§462. Definitions

Whenever used in this article:

1. "Distributor" means any person who primarily offers, sells or distributes new motor vehicles to franchised motor vehicle dealers or maintains distributor

representatives within the state.

* * *

6. "Franchise" means a written arrangement for a definite or indefinite period in which a manufacturer or distributor grants to a franchised motor vehicle dealer a license to use a trade name, service mark or related characteristic, and in which there is a community of interest in the marketing of motor vehicles or services related thereto at wholesale, retail, by lease or otherwise and/or pursuant to which a franchised motor vehicle dealer purchases and resells.

7. "Franchised motor vehicle dealer" means any person required to be registered pursuant to section four hundred fifteen of this chapter and who has been granted a "franchise" as defined herein.

8. "Franchisor" means any manufacturer, distributor, distributor branch or factory branch which enters into or is presently a party to a franchise with a franchised motor vehicle dealer.

9. "Manufacturer" means any person, partnership, corporation, association, factory branch or other

entity engaged in the business of manufacturing or assemblying (sic) new and unused motor vehicles for sale in this state.

* * *

§463. Unfair business practices by franchisors

* * *

2. It shall be unlawful for any franchisor:

* * *

(d)(1) To terminate, cancel or refuse to renew the franchise of any franchised motor vehicle dealer except for due cause, regardless of the terms of the franchise. A franchisor shall notify a franchised motor vehicle dealer, in writing, of its intention to terminate, cancel

or refuse to renew the franchise of such dealer at least ninety days before the effective date thereof, stating the specific grounds for such termination, cancellation or refusal to renew. In no event shall the term of any such franchise expire without the written consent of the franchised motor vehicle dealer involved prior to the expiration of at least ninety days following such written notice except as hereinafter provided.

* * *

New York Vehicle and Traffic Law, Article 16 - Registration of Dealers and Transporters

§415. Registration of manufacturers, dealers, repairmen and others

1. Definitions. The following terms when used in this article, shall be deemed to mean and include:

a. "Dealer" means a person engaged in the buying, selling or dealing in motor vehicles, motorcycles or trailers, other than mobile home trailers, at retail or wholesale; except, however, trailers with an unladen weight of less than one thousand pounds.... Any person who sells, or offers for sale more than five motor vehicles, motorcycles or trailers in any calendar year or who displays or permits the display of three or more motor vehicles, motorcycles or trailers for sale at

any one time or within any one calendar month upon premises owned or controlled by him, if such vehicles were purchased, acquired or otherwise obtained by such person for the purpose of resale, will be regarded as a dealer.

b. "Person" includes an individual, firm, corporation, co-partnership, joint venture, joint adventurers or association, and the plural as well as the singular number.

* * *

3. Registration of dealers. No person shall engage in business as a dealer, or represent or advertise that he is engaged or intends to

engage in such business in this state, unless there shall have been issued to him a certificate of registration as provided in subsection seven of this section...

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* * *

New York General Obligations Law §5-1401.

Choice of law

1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction

otherwise covered by subsection one of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code.

* * *

Excerpts from McKinney's Session Laws of New York 1984, chapter 421, Memorandum of Legislative Representative of City of New York

SUMMARY OF PROVISIONS

This bill adds new Title 14 to Article 5 of the General Obligations Law, to provide for the enforcement of the choice of New York law as governing law in a non-consumer contractual obligation involving at lease $250,000.

REASONS FOR SUPPORT

New York is one of the world's major financial and commercial Centers. Its position, however, is by no means unchallenged, and it is important that the State remain alert to ways in which, at

relatively little cost, its position can be enhanced.

As business has become more geographically diverse, the typical commercial, mercantile or financial contract has become more and more likely to involve parties located in more than one state or more than one nation. Indeed, financial contracts involving signatories based in a dozen or more jurisdictions are by no means uncommon.

It is standard practice in such contracts to prescribe that the contract shall be governed by and construed in accordance with the law of a jurisdiction with a well-developed system of commercial jurisprudence, and the parties

thereto wish to have the option of electing such laws. However, it is at least possible that, under present New York law, some New York Courts would reject a choice of New York law on the ground that the particular contract had insufficient "contact" or "relationship" with New York. The mere existence of this possibility has frequently deterred parties from choosing the law of New York for major contracts, to the detriment of the standing of New York as a commercial and financial center.

In order to encourage the parties to significant commercial, mercantile or financial contracts to choose New York law, it is important

not only that the parties by certain that their choice of law will not be rejected by a New York Court but also that, in the unlikely event that a dispute does arise and the parties have agreed that such dispute may be heard by a New York Court, such Court will in fact proceed to hear and determine the case. New York Courts are the tribunals most expert in New York law, and although it is not uncommon for a court to be required to apply the law of another jurisdiction to the facts before it, it is to be expected that the parties to a contract who decide to choose New York law will also wish to provide that actions on such contracts be

heard by the New York Courts. To the extent there is uncertainty about any aspect of the ability of a contracting party effectively to submit itself to the jurisdiction of the New York Courts, such uncertainty will almost certainly operate to deter the parties from selecting New York law in the first place. However, it is not intended by virtue of the proposed modification to the inconvenient forum rule to imply that any action arising out of or relating to any contract, agreement or undertaking not covered by the new rule is to be stayed or dismissed under the existing rule.

The policies underlying the proposed legislation are consistent with the concept of limiting the involvement of New York Courts to cases with requisite New York contract. The central premise of the proposal is that where parties at arms length agree to resolve disputes arising out of their contract in New York Court and either select New York law to govern their contract, or have another important contract with New York, then New York does have, by virtue of the mutual consent of all parties to the contract, significant contract with the parties and the underlying transaction. Although the bill refers to United States

dollars for certain thresholds of applicability, it is assumed that New York Courts will apply the equivalent in foreign currency and/or goods and services.

Until existing ambiguities in the jurisdictional laws of New York are addressed, parties to substantial multijurisdiction contracts will continue to be reluctant to choose New York law to govern them if, notwithstanding the parties' willingness to submit to the jurisdiction of the New York Courts, there is any likelihood that such courts will refuse to accept the choice of New York law or refuse on either jurisdiction or forum non conveniens grounds to entertain an

action on the contract if a dispute does arise. In that connection, it is assumed that the New York Courts will interpret the word "non-resident" in Section 5-1402 liberally for purposes of Rule 327 to include foreign sovereigns and instrumentalities as well as foreign partnerships. The benefits to New York in being a world financial and legal capital are of such importance and the benefits to New York in permitting business around the world to choose New York law for their contracts are so clear that the risk of some very slight increase in the case load of the New York Courts can be accepted without undue alarm.

Accordingly, the Mayor urges upon the Legislature the earliest possible favorable consideration of this proposal.